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**Supreme Court of the United States**

**ORIGINAL TERM, 1942**

**No. 392**

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**JOHN E. HEAD, & L. A. LEA COUNTY  
FURNISHING CO., ET AL., APPELLANTS,**

**NEW MEXICO BOARD OF EXAMINERS  
IN CYTOMETRY.**

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**APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO**

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**FILED APRIL 21, 1942  
RECORDED INDEXED SEPTEMBER 11, 1942**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY  
PUBLISHING CO., ET AL., APPELLANTS,

vs.

NEW MEXICO BOARD OF EXAMINERS  
IN OPTOMETRY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

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[fol. A]

**IN THE DISTRICT COURT OF LEA COUNTY  
STATE OF NEW MEXICO**

No. 18794

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, Plaintiff,

—vs.—

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING Co.; PERMIAN BASIN RADIO CORPORATION; and KWEW, Inc., Defendants.

**APPEARANCES**

For the Plaintiff:

Robert F. Pyatt, Esquire, Hobbs, New Mexico.

For the Defendants:

L. George Schubert, Esquire, Hobbs, New Mexico, for Defendants Agnes K. Head and KWEW, Inc.

Theodore R. Johnson, Esquire, of Williams, Johnson & Houston, Hobbs, New Mexico, for Defendant Permian Basin Radio Corporation.

[fol. 1]

**IN THE DISTRICT COURT OF LEA COUNTY**

**STATE OF NEW MEXICO**

No. 18794

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, Plaintiff,

—vs.—

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING Co.; PERMIAN BASIN RADIO CORPORATION; and KWEW, Inc., Defendants.

**COMPLAINT—Filed September 26, 1960**

Plaintiff, for its claim against defendants, states:



[fol. 2]

1.

Plaintiff is an agency of the State of New Mexico, and brings this suit in its official capacity. Defendant Roberts is a resident of the State of Texas. Defendant Agnes K. Head is a resident of Lea County, New Mexico, and does business as Lea County Publishing Company, publishing the "Hobbs Flare", a newspaper, in Hobbs, New Mexico. Defendants Permian Basin Radio Corporation and KWEW, Inc. are corporations authorized to transact business in New Mexico, and each operates a radio transmitting station in Hobbs, Lea County, New Mexico. The acts complained of, or threatened in the future, have taken place or will take place in Lea County, New Mexico.

2.

By virtue of the terms of Sec. 67-7-4, N.M.S.A. 1953 Comp., as amended, it is the duty of plaintiff to administer those statutes of the State of New Mexico pertaining to the practice of optometry, compiled as Sections 67-7-1 to 67-7-14, N.M.S.A. 1953 Comp., both inclusive, as amended.

3.

Defendant Roberts has for some period of time conducted radio and newspaper advertising in Lea County, New Mexico. While Defendant Roberts presently resides in Texas, he has been duly licensed as an optometrist by plaintiff to practice in New Mexico. Defendant Roberts now practices optometry in Texas, just across the New Mexico-Texas boundary, a few miles each [sic] of Hobbs, Lea County, New Mexico. Defendant Roberts places such [fol. 3] advertising with the other defendants in this cause.

4.

Such advertising consists of the quotation of prices on eyeglasses and spectacles, and of the quotation of discounts to be offered on eyeglasses and spectacles, all of which has been done repeatedly, on numerous occasions, and directly in violation of Sec. 67-7-13, N.M.S.A. 1953 Comp., one of the statutes required to be administered by plaintiff.

5.

Defendant Roberts has threatened to continue such advertising, and plaintiff believes, and therefore alleges the fact to be, that the other defendants will accept such advertising in the future, and that the same will be continued by them.

6.

Defendant Roberts solicits patients in New Mexico by the additional method of sending circulars and other advertising directly to residents of this State, by means of the mail. Such circulars and other advertising quotes prices on eyeglasses and spectacles, and quotes discounts to be offered on eyeglasses and spectacles. Defendant Roberts threatens to continue these acts.

7.

Plaintiff has no plain, speedy, or adequate remedy at law, and therefore invokes the provisions of Sec. 67-26-24, N.M.S.A. 1953 Comp. 1959 Supp., being Sec. 24 of the Uniform Licensing Act.

Wherefore, plaintiff prays for this Court to award it an Injunction, enjoining and restraining defendant Roberts [fol. 4] from advertising in New Mexico, contrary to the provisions of Sec. 67-7-13, supra, and enjoining and restraining the other defendants in this cause from accepting and publishing such advertising in New Mexico; for its costs; and for other just relief.

Hilton A. Dickson, Jr., Attorney General; Robert F. Pyatt, Special Assistant Attorney General.

[fol. 5] SHERIFF'S RETURNS (omitted in printing).

4  
[fol. 8]

IN THE DISTRICT COURT OF LEA COUNTY

SEPARATE ANSWER OF DEFENDANT AGNES K. HEAD,  
d/b/a LEA PUBLISHING Co.—Filed October 25, 1961

Comes Now defendant Agnes K. Head and for answer to  
plaintiff's Complaint states:

First Defense

Defendant moves the Court to dismiss this action because the Complaint fails to state a cause of action against this defendant upon which relief can be granted.

Second Defense

Defendant moves the Court to dismiss this action because the Court lacks jurisdiction [sic] of the subject matter of the action for the reason that it appears on the face of the Complaint that defendant, Roberts, practices optometry in the State of Texas and is outside the jurisdiction of this Court and the Statutes and laws made and provided are inapplicable to this defendant accepting advertising from a resident of another state lawfully engaging in a profession in said state.

Third Defense

Defendant further moves that said Complaint be dismissed because Sec. 67-7-13, N.M.S.A. 1953 Comp., has no reasonable relation to the maintenance of public health [fol. 9] of citizens of the State of New Mexico and unreasonably discriminates against this defendant and to enforce same would deny said defendant equal protection of the law and deprive her of property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Sec. 18, Article II, of the Constitution of the State of New Mexico.

Fourth Defense

Defendant moves that said Complaint be dismissed on the grounds that the Complaint shows on its face that this defendant is engaged in interstate commerce and such

Statute imposes an undue burden on, and discriminates against such commerce and that it imposes an arbitrary and unreasonable imposition on this defendant's privilege of doing business and deprives her of her property without due process of law.

Wherefore, defendant moves that plaintiff's Complaint be dismissed.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for Defendant, Agnes K. Head.

Certificate (omitted in printing):

[fol. 10]

IN THE DISTRICT COURT OF LEA COUNTY

SEPARATE ANSWER OF DEFENDANT KWEW, INC.—

Filed October 28, 1961

Comes Now the statutory agent, Walter E. Whitmore, Jr., for defendant KWEW, Inc. and in answer to plaintiff's complaint states:

1. Defendant moves the Court to dismiss this action on the grounds that the Complaint shows on its face that the defendant is engaged in interstate commerce and Section 67-7-13, N.M.S.A. 1953 Comp. creates an undue burden on, and imposes an arbitrary and unreasonable imposition on defendant's rights and privileges of engaging in interstate commerce. The grant of such an injunction would deprive the defendant of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Section 18, Article II, of the Constitution of the State of New Mexico.

2. Defendant moves the Court to dismiss this action because the Complaint fails to state a cause of action against defendant in that Sec. 67-7-13 N.M.S.A. 1953 Comp. was not intended to impose liability upon the advertising media since the act as a whole seems to be directed toward preventing improper practices by those persons licensed by the State of New Mexico to practice optometry.

[fol. 11] 3. Defendant moves the Court to dismiss the Complaint because the Court lacks jurisdiction of the subject matter in that Defendant Roberts is outside the jurisdiction of this court and the Statutes and laws of New Mexico are inapplicable to defendant Roberts, who, as it appears on the face of the Complaint; is a Texas resident and is lawfully engaged in the practice of optometry in the State of Texas. That Section 67-7-13 is not applicable to defendant KWEW, Inc. to prevent defendant from accepting advertising from a resident of another state.

4. Defendant moves the Court to dismiss the Complaint because there is a legal and binding contract between defendant Roberts and defendant KWEW, Inc. made in the State of Texas, which would be grounds for an action against defendant KWEW, Inc. by defendant Roberts if defendant KWEW, Inc. should be enjoined from completing and performing its contract with defendant Roberts.

5. Defendant moves the Court to dismiss the Complaint because approximately one half of the service area of the defendant is in the State of Texas. An optometrist in the State of Texas is not prevented from advertising the price he will charge for glasses and thus should be allowed to place his advertising with whatever media will reach his prospective clients.

Walter E. Whitmore, Jr., Statutory Agent of  
KWEW, Inc., P. O. Box 1019, Roswell, New  
Mexico.

Copy mailed to Special Assistant Attorney General Robert F. Pyatt on October 28, 1960.



[fol. 12]

IN THE DISTRICT COURT OF LEA COUNTY —

MOTION TO STRIKE SEPARATE ANSWER OF DEFENDANT  
KWEW, Inc. — Filed December 6, 1960

Plaintiff, for its motion to strike the separate answer of Defendant KWEW, Inc., states:

1.

Such separate answer was submitted and filed by one Walter E. Whitmore, Jr., as statutory agent of Defendant, KWEW, Inc.

2.

Walter E. Whitmore, Jr., is not, and at the time of such filing, was not a member of the Bar of the State of New Mexico.

Wherefore, Plaintiff respectfully prays that the separate answer of Defendant, KWEW, Inc., be stricken.

Respectfully submitted,

Hilton A. Dickson, Jr., Attorney General, Santa Fe,  
New Mexico;

Robert F. Pyatt, Special Assistant Attorney Gen-  
eral, P. O. Box 638, Hobbs, New Mexico;

Attorneys for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 13]

IN THE DISTRICT COURT OF LEA COUNTY

SEPARATE ANSWER OF DEFENDANT PERMIAN BASIN  
RADIO CORPORATION — Filed January 9, 1961

Comes Now defendant Permian Basin Radio Corporation and for its answer to the plaintiff's complaint filed herein states:

### First Defense

Defendant moves the court to dismiss this action because the complaint fails to state a cause of action against this defendant upon which relief can be granted.

### Second Defense

Defendant moves the court to dismiss this action because the court lacks jurisdiction of the subject matter of the action for the reason that it appears on the face of the complaint that defendant, Roberts, practices optometry in the State of Texas and is outside the jurisdiction of this court and the statutes and laws made and provided are inapplicable to this defendant accepting advertising from a resident of another state lawfully engaging in a profession in such other state.

### Third Defense

Defendant further moves that said complaint be dismissed because Sec. 67-7-13, N.M.S.A. 1953 Comp., has no reasonable relation to the maintenance of public health of citizens [fol. 14] of the State of New Mexico and unreasonably discriminates against this defendant and to enforce same would deny said defendant equal protection of the law and deprive it of property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Sec. 18, Article II, of the Constitution of the State of New Mexico.

### Fourth Defense

Defendant moves that said complaint be dismissed on the grounds that the complaint shows on its face that this defendant is engaged in interstate commerce and such statute imposes an undue burden on, and discriminates against such commerce and that it imposes an arbitrary and unreasonable imposition on this defendant's privilege of doing business and deprives it of its property without due process of law.

Wherefore defendant prays that the plaintiff's complaint be dismissed and that it have and recover its costs herein

expended, and for such other relief as to the court upon the trial of this cause may deem proper in the premises.

Williams, Johnson & Houston, By Theodore R. Johnson, P. O. Box 1926, Hobbs, New Mexico, Attorneys for Defendant, Permian Basin Radio Corporation.

Certificate of Service (omitted in printing).

[fol. 15]

IN THE DISTRICT COURT OF LEA COUNTY

DECREE—January 4, 1961

This Cause came on to be heard on the 4th day of January, 1961; Plaintiff being represented by the Attorney General of New Mexico and by Robert F. Pyatt, Special Assistant Attorney General, and no one appearing for Defendant Abner Roberts; and it appearing to the Court that Defendant Abner Roberts was personally served with process in the State of Texas as provided by law; and Defendant Abner Roberts having failed to appear or answer the Complaint as required by law; and after examining the file and hearing the proof (sic) of Plaintiff, the Court finds:

1.

The allegations contained in Plaintiff's Complaint as to defendant Abner Roberts are true and the Court adopts such allegations as its findings of fact.

2.

Judgment should be entered as follows:

—Enjoining and restraining Defendant Abner Roberts from advertising by any means whatsoever, within the State of New Mexico, the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings, or which in any other manner is violative of the provisions of Sec. 67-7-13 (m), [fol. 16] N.M.S.A., 1953, Compilation.

It Is Therefore Ordered, Adjudged and Decreed as follows:

Defendant Abner Roberts is hereby enjoined and restrained from advertising by any means whatsoever, within the State of New Mexico, the quotations of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings, or which in any other manner is violative of the provisions of Sec. 67-7-13 (m) N.M.S.A., 1953 Compilation.

John R. Brand

[fol. 17]

IN THE DISTRICT COURT OF LEA COUNTY

MOTION FOR SUMMARY JUDGMENT—Filed January 12, 1961

Plaintiffs respectfully move the Court for a summary judgment based on the pleadings, and as grounds therefor state:

1.

There is no genuine issue as to any material fact.

Robert F. Pyatt, Special Assistant Attorney General,  
for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 18]

IN THE DISTRICT COURT OF LEA COUNTY

AMENDED SEPARATE ANSWER OF DEFENDANT KWEW, INC.—  
Filed January 17, 1961

Comes Now Defendant KWEW, Inc., and by agreement with plaintiff's attorney to file this amended separate answer, by its attorney, L. George Schubert, of Hobbs, New Mexico, states:

### First Defense

Defendant moves the court to dismiss this action because the Complaint fails to state a cause of action against this defendant upon which relief can be granted.

### Second Defense

Defendant moves the Court to dismiss this action because the Court lacks jurisdiction of the subject matter of the action for the reason that it appears on the face of the Complaint that defendant Roberts practices optometry in the State of Texas and is outside the jurisdiction of this Court and the statutes and laws made and provided are inapplicable to this defendant accepting advertising from a resident of another state lawfully engaging in a profession in said state.

### Third Defense

Defendant further moves that said Complaint be dismissed because Sec. 67-7-13, N.M.S.A., 1953 Comp., has no reasonable relation to the maintenance of public health of citizens of the State of New Mexico and unreasonably discriminates against this defendant and to enforce same would deny said defendant equal protection of the law and deprive it of property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States and Sec. 18, Article II, of the Constitution of the State of New Mexico.

### Fourth Defense

Defendant moves that said Complaint be dismissed on the grounds that the Complaint shows on its face that this defendant is engaged in interstate commerce and such statute imposes an undue burden on and discriminates against such commerce and that it imposes an arbitrary and unreasonable imposition on this defendant's privilege of doing business and deprives it of its property without due process of law.



Wherefore, defendant moves that plaintiff's Complaint be dismissed.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for Defendant KWEW, Inc.

Certificate of Service (omitted in printing).

[fol. 20]

IN THE DISTRICT COURT OF LEA COUNTY

AFFIDAVIT OF SERVICE OF DECREE—Filed January 20, 1961

THE STATE OF TEXAS,  
COUNTY OF GAINES, SS.

I, H. F. Bell, being first duly sworn, on oath, state: That I am a citizen of the United States and over the age of eighteen years, and not a party of said action; that I have made service of one certified copy of Decree entered in the above matter against Defendant Abner Roberts by delivering same to Defendant Abner Roberts on the 11th day of January, 1961.

H. F. Bell, Affiant

Subscribed and Sworn to before me this 11th day of January, 1961.

Joyce C. Pate, Notary Public, Gaines County, Texas.

My commission expires June 1, 1961.

Came to hand on the 11 day of Jan., A. D., 1961 at 11:30 o'clock A. M., and executed by me on the 11th day of Jan., A. D., 1961, at 1:55 o'clock P. M. I actually and necessarily traveled 50 miles in the service of this writ.

Fees:

Serving cop--- \$1.25

Mileage 50 at .10 5.00

Total \$6.25

Floyd Taylor, Sheriff, Gaines County, Texas, by  
H. F. Bell.

[fol. 21]

## IN THE DISTRICT COURT OF LEA COUNTY

DEFENDANTS REQUESTED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW—Filed March 17, 1961

Comes Now the defendants, Agnes Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., and request the Court to make the following findings of fact:

## I.

That Agnes Head is owner and publisher of the Hobbs Flare a weekly newspaper published in Hobbs, Lea County, New Mexico, and has a second class mailing permit issued by the United States Postal Department; such paper has a circulation in thirteen states and the District of Columbia and subscribers in thirty cities, towns, and villages in Central West Texas.

## II.

That Permian Basin Radio Corporation, owner of station KHOB in Hobbs, Lea County, New Mexico, and KWEW, Inc., a radio station in Hobbs, Lea County, New Mexico, are licensed and regulated by the Federal Communications Commission of the United States with radio coverage and program reception in at least ten counties in Central West Texas.

## III.

That the Hobbs Flare, KWEW and KHOB receive and disseminate local, regional, and national news coverage and [fol. 22] paid advertising with such regional advertising and news being concentrated in adjacent counties in New Mexico and Central West Texas, specifically the following cities in Texas, to-wit:

Denver City, Andrews, Seminole, Seagraves, Brownfield, Kermit, Bledsoe, and Plains.

## IV.

That the Defendant newspaper and radio stations severally contracted with Dr. Abner Roberts, a duly licensed and lawfully engaged optometrist in the state of Texas, a resident of Gaines County Texas, practicing exclusively in said county to advertise his offer to prescribe, fit, and sell at quoted prices eyeglasses, spectacles, lenses, frames or mountings at his place of business in Gaines County, Texas.

## REQUESTED CONCLUSIONS OF LAW

Comes Now defendants, Agnes Head d/b/a Lea County Publishing Co., Permian Basis (sic) Radio Corporation, and KWEW, Inc. and respectfully request the Court to make the following conclusions of law:

## I.

Defendant, Dr. Abner Roberts does not engage in the practice of optometry in the state of New Mexico, and his activities are beyond the jurisdiction of the laws and statutes of this state.

## II.

That Section 67-7-3, N. M. S. A., 1953 Compilation, the statute upon which this action is based, is inapplicable to defendants accepting advertising from a resident of another state lawfully engaged in a profession in such other state, because such statute violates the provisions of Article I, Section 8, Paragraph 3, of the Constitution of the United States, relating to interstate commerce.

[fol. 23].

## III.

That Section 67-7-3, N.M.S.A., 1953 Compilation is an unreasonable infringement of personal property rights and an unwarranted oppressive interference with the liberty of contract and violates the 14th Amendment to the Consti-

tution of the United States and Section 18, Article 2, of the Constitution of the State of New Mexico.

Respectfully,

Williams, Johnson, and Houston, By: Theodore R. Johnson, Box 1926, Hobbs, New Mexico, Attorneys for Defendant, Permian Basin Radio Corporation; and

L. George Schubert, Box 185, Hobbs, New Mexico, Attorney for Defendants, Agnes K. Head and KWEW, Inc., a corporation.

Certificate of Service (omitted in printing).

[fol. 24]

IN THE DISTRICT COURT OF LEA COUNTY

PLAINTIFF'S REQUESTED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW—Filed March 24, 1961

Plaintiff respectfully request (sic) the Court to make the following findings of fact:

1.

Plaintiff is an agency of the State of New Mexico and brings this suit in its official capacity. Defendant Roberts is a resident of the State of Texas. Defendant Agnes K. Head is a resident of Lea County, New Mexico, and does business in such county as Lea County Publishing Company, publishing the "Hobbs Flare", a newspaper in Hobbs, New Mexico. Defendants Permian Basin Radio Corporation and KWEW, Inc. are corporations authorized to transact business in New Mexico, and each operates a radio transmitting station in Hobbs, Lea County, New Mexico.

2.

Defendant Roberts practices optometry in Gaines County, Texas. This practice is conducted just across the New Mexico-Texas boundary, a few miles east of Hobbs, New Mexico.

3.

Defendant Roberts has for some period of time conducted radio and newspaper advertising through the news media of [fol. 25] the other defendants in this case. Such advertising consists of the quotations of prices on eyeglasses and spectacles and of the quotation of discounts to be offered on eyeglasses and spectacles. This advertising is published by the other defendants, which publishing originates in Hobbs, Lea County, New Mexico.

4.

This advertising will be continued, unless permanently enjoined.

5.

All defendants with the exception of defendant Abner Roberts have been personally served with process within the State of New Mexico.

#### REQUESTED CONCLUSIONS OF LAW

Plaintiff respectfully requests the Court to make the following conclusions of law:

1.

By virtue of the terms of Section 67-7-4, N.M.S.A. 1953 Comp., as amended, it is the duty of plaintiff to administer those statutes of the State of New Mexico pertaining to the practice of optometry, compiled as Sections 67-7-1 to 67-7-14, N.M.S.A. 1953 Comp., both inclusive as amended.

2.

The advertising done by the defendant Roberts and published through the newspaper and radio media of the other defendants in this case is directly in violation of Section [fol. 26] 67-7-13, N.M.S.A., 1953 Comp., which is one of the statutes required to be administered by plaintiff.



3.

The publication of the advertising by the defendants in this cause constitutes a violation of Section 67-7-13, N.M.S.A., 1953 Comp.

4.

The defendants in this case, other than defendant Roberts, in publishing such advertising, are within the jurisdiction of the laws of the State of New Mexico, and are within the jurisdiction of this Court, and are amenable to its process.

5.

The defendants in this case, other than defendant Roberts, in publishing such advertising, are aiding and abetting in, and encouraging the violation of Section 67-7-13, N.M.S.A., 1953 Comp., and such conduct by them should be permanently enjoined.

6.

The enforcement of Section 67-7-13, N.M.S.A. 1953, (sic) Comp., by enjoining the defendants, other than defendant Roberts, from aiding and abetting in the violation of this section does not offend either the Constitution of the United States or the Constitution of New Mexico.

7.

The granting of injunctive relief against all defendants, other than defendant Roberts, is not affected by the fact that defendant Roberts is a resident of Gaines County, Texas.

[fol. 27]

8.

The provisions of Section 67-7-13, N.M.S.A. 1953 Comp., prohibiting certain price advertising and discount advertising are a valid exercise by the legislature of the State of New Mexico of the police power, having been enacted in protection of the public health and welfare. These provi-

sions do not offend either the Constitution of the United States or the Constitution of the State of New Mexico.

## 9.

Plaintiff has no plain, speedy or adequate remedy at law, and injunctive relief is necessary.

Respectfully submitted,

Robert F. Pyatt, Special Assistant Attorney General.

Certificate of Service (omitted in printing).

[fol. 28]

IN THE DISTRICT COURT OF LEA COUNTY

**Decision of the Court—March 28, 1961**

The Court makes the following

**FINDINGS OF FACT**

1. Plaintiff is an agency of the State of New Mexico and brings this suit in its official capacity. Defendant Roberts is a resident of the State of Texas. Defendant Agnes K. Head is a resident of Lea County, New Mexico, and does business in such county as Lea County Publishing Company, publishing the "Hobbs Flare", a newspaper in Hobbs, New Mexico. Defendants Permian Radio Corporation and KWEW, Inc. are corporations authorized to transact business in New Mexico, and each operates a radio transmitting station in Hobbs, Lea County, New Mexico.

2. Defendant Roberts practices optometry in Gaines County, Texas. This practice is conducted just across the New Mexico-Texas boundary, a few miles east of Hobbs, New Mexico.

3. Defendant Roberts has for some period of time conducted radio and newspaper advertising through the news media of the other defendants in this case. Such advertising consists of the quotation of prices on eyeglasses and spectacles and of the quotation of discounts to be

offered on eyeglasses and spectacles. This advertising is [fol. 29] published by the other defendants, which publishing originates in Hobbs, Lea County, New Mexico.

4. This advertising will be continued, unless permanently enjoined.

5. All defendants with the exception of Defendant Abner Roberts have been personally served with process within the State of New Mexico.

The Court adopts the following

#### CONCLUSIONS OF LAW

1. By virtue of the terms of Section 67-7-4, N. M. S. A. 1953 Comp., as amended, it is the duty of plaintiff to administer those statutes of the State of New Mexico pertaining to the practice of optometry, compiled as Sections 67-7-1 to 67-7-14, N.M.S.A. 1953 Comp., both inclusive as amended.

2. The advertising done by the Defendant Roberts and published through the newspaper and radio media of the other defendants in this case is directly in violation of Section 67-7-13, N.M.S.A. 1953 Comp., which is one of the statutes required to be administered by the plaintiff.

3. The publication of the advertising by the defendants in this cause constitutes a violation of Section 67-7-13, N.M.S.A. 1953 Comp.

4. The defendants in this case, other than defendant Roberts, in publishing such advertising, are within the [fol. 30] jurisdiction of the laws of the State of New Mexico, and are within the jurisdiction of this Court, and are amenable to its process.

5. The defendants in this case, other than defendant Roberts, in publishing such advertising, are aiding and abetting in, and encouraging the violation of Section 67-7-13, N.M.S.A. 1953 Comp., and such conduct by them should be permanently enjoined.

6. The enforcement of Section 67-7-13, N.M.S.A. 1953, Comp., by enjoining the defendants, other than defendant

Roberts, from aiding and abetting in the violation of this section does not offend either the Constitution of the United States or the Constitution of New Mexico.

7. The granting of injunctive relief against all defendants, other than defendant Roberts, is not affected by the fact that defendant Roberts is a resident of Gaines County, Texas.

8. The provisions of Section 67-7-13, N.M.S.A., 1953, Comp., prohibiting certain price advertising and discount advertising are a valid exercise by the Legislature of the State of New Mexico of the police power, having been enacted in protection of the public health and welfare. These provisions do not offend either the Constitution of the United States or the Constitution of New Mexico.

9. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is necessary.

All requested findings of fact and conclusions of law [fol. 31] submitted by the parties and not adopted are hereby refused.

Done This the 28th day of March, 1961.

John R. Brand, District Judge.

[fol. 32]

IN THE DISTRICT COURT OF LEA COUNTY

FINAL DECREE—Filed April 7, 1961

This Cause came on to be heard on the 19th day of January, 1961, defendants Agnes K. Head, d/b/a Lea County Publishing Co., and KWEW, Inc., being represented by L. George Schubert, and defendant Permian Basin Radio Corporation being represented by Theodore R. Johnson of Williams, Johnson & Houston; and plaintiff being represented by the Attorney General of New Mexico and by Robert F. Pyatt, Special Assistant Attorney General; and the parties having entered into stipulations herein

as to the facts of the case and the Court having made and filed its Findings of Fact and Conclusions of Law.

1.

The Court has jurisdiction of the subject matter and of defendants Agnes K. Head, d/b/a Lea County Publishing Co., KWEW, Inc., and Permian Basin Radio Corporation, and of plaintiff New Mexico Board of Examiners in Optometry; that judgment should enter for the plaintiff granting the injunctive relief prayed for in its complaint against said defendants.

It Is, Therefore, Ordered, Adjudged, and Decreed as follows:

[fol. 33] Defendants Agnes K. Head, d/b/a Lea County Publishing Co., KWEW, Inc., and Permian Basin [sic] Radio Corporation are hereby perpetually enjoined and restrained from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eyeglasses, spectacles, lenses, frames, or mountings or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes moderate prices, low prices, lowest prices, guaranteed glasses, satisfaction guaranteed, or words of similar import, as prohibited by the provisions of Section 67-7-13(m), 1953 Compilation, to all of which the defendants object and except.

John R. Brand, District Judge.

Submitted:

Robert F. Pyatt, Special Assistant Attorney General.

L. George Schubert, Attorney for Agnes K. Head, d/b/a Lea County Publishing Co., and KWEW, Inc.

Theodore R. Johnson, Attorney for Permian Basin Radio Corporation.



[fol. 34]

## IN THE DISTRICT COURT OF LEA COUNTY

MOTION FOR APPEAL—Filed April 21, 1961

Come Now defendants Agnes Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., and move the Court for an order allowing appeal in this cause, and in support of such motion, respectfully show to the Court:

That they, and each of them, feel aggrieved by the judgment of the District Court of Lea County in favor of the plaintiff in the above cause and desire to appeal the same to the Supreme Court of the State of New Mexico.

Wherefore, defendants pray that they be granted an appeal to the Supreme Court of the State of New Mexico from the judgment entered in the above cause.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for defendants Agnes Head, d/b/a Lea County Publishing Co. and KWEW, Inc.

Williams, Johnson & Houston, By Theodore R. Johnson, P. O. Box 1926, Hobbs, New Mexico, Attorneys for Permian Basin Radio Corporation.

Certificate of Service (omitted in printing).

[fol. 35]

## IN THE DISTRICT COURT OF LEA COUNTY

ORDER ALLOWING APPEAL—April 19, 1961

Now on this day the above styled and numbered cause came on to be heard on the motion of the defendants Agnes Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., for an order permitting an appeal to the Supreme Court of the State of New Mexico from the judgment entered in favor of the plaintiff therein, and the Court, after reading said motion

and being fully advised in the premises, finds that said appeal should be granted.

It Is, Therefore, Considered and Ordered by the Court that said defendants be, and they are hereby allowed an appeal to the Supreme Court of the State of New Mexico from the judgment entered in the above styled cause.

Done in Open Court this 19 day of April, 1961.

John R. Brand, District Judge.

Certificate of Service (omitted in printing).

[fol. 36]

IN THE DISTRICT COURT OF LEA COUNTY

NOTICE OF APPEAL—Filed May 8, 1961

To: New Mexico Board of Examiners in Optometry and Robert F. Pyatt, its attorney.

You Are Hereby Notified that by Order dated the 19th day of April, 1961, the Court granted defendants Agnes Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., an appeal from the final judgment entered in the above entitled and numbered cause.

This notice is given in addition to the notice given Robert F. Pyatt on April 23, 1961.

Dated this 6th day of May, 1961.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for defendants Agnes Head d/b/a Lea County Publishing Co., and KWEW, Inc.

and

Williams, Johnson & Houston By: Theodore R. Johnson, P. O. Box 1926, Hobbs, New Mexico, Attorneys for Permian Basin Radio Corporation.

Certificate of Service (omitted in printing).

[fol. 38]

## IN THE DISTRICT COURT OF LEA COUNTY

PRAECIPE FOR RECORD—Filed May 8, 1961

W. M. Beauchamp  
 Clerk of the District Court  
 Lovington, New Mexico

Dear Sir:

You will please prepare a complete record of the above entitled and numbered cause for the purpose of an appeal to the Supreme Court of the State of New Mexico, including therein the following:

- (a) All Pleadings
- (b) All Orders and Judgments of the Court
- (c) All Requested Findings of Fact and Requested Conclusions of Law
- (d) Decisions of the Court
- (e) All stipulations and oral evidence introduced at the trial
- (f) All Exhibits
- (g) Reporter's Transcript of all Proceedings not filed of record
- (h) Motion and Order Granting Appeal
- (i) Notice of Appeal
- (j) Clerk's Certificate
- [fol. 39] (k) Reporter's Certificate
- (l) All other instruments and matters necessary to obtain a complete record for the purposes of appeal to the Supreme Court of the State of New Mexico
- (m) Your Cost Bill

Dated This 6th day of May, 1961.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for defendants Agnes Head d/b/a Lea County Publishing Co., and KWEW, Inc.

and

Williams, Johnson & Houston, By Theodore R. Johnson, P. O. Box 1926, Hobbs, New Mexico, Attorneys for Permian Basin Radio Corporation.

Certificate of Service (omitted in printing).

[fol. 40]

IN THE DISTRICT COURT OF LEA COUNTY

CLERK'S AND REPORTER'S CERTIFICATE AS TO COSTS

We, the undersigned W. M. Beauchamp, Clerk of the District Court, Fifth Judicial District in and for the County of Lea, State of New Mexico, and Ray Crowder, Official Court Reporter thereof, do, individually and severally, hereby certify and acknowledge that satisfactory arrangements have been made by the defendants-appellants, Agnes K. Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc., for payment of costs and compensation for preparation of the Transcript of Record on the appeal from the Order dated 19th day of April, 1961, and entered and filed herein on the 21st day of April, 1961.

Witness our hands and the seal of the Clerk of the District Court on this 28th day of June, 1961.

W. M. Beauchamp, Clerk of the District Court.

Ray Crowder, Official Court Reporter.

[fol. 41]

## IN THE DISTRICT COURT OF LEA COUNTY

## WAIVER OF NOTICE RE BILL OF EXCEPTIONS—

Filed June 28, 1961

Comes Now the Plaintiff, by Robert F. Pyatt, Esquire, its attorney, and hereby waives the usual five days notice of intention to apply for an order signing and sealing the Bill of Exceptions herein, and consents that the same may be entered at anytime within return date when presented by the Attorneys for the Defendants.

Robert F. Pyatt, Special Assistant Attorney General,  
Attorney for Plaintiff, Hobbs, New Mexico.

[fol. 43]

## IN THE DISTRICT COURT OF LEA COUNTY

## STATE OF NEW MEXICO

[Title omitted]

**Transcript of Proceedings**

Be It Remembered that the above entitled and numbered cause came on to be heard before the Honorable John R. Brand, District Judge in and for the Fifth Judicial District, Division III, State of New Mexico, on Thursday, January 19, 1961, in the District Court of Lea County, State of New Mexico; the Plaintiff appearing through its attorney, Assistant Attorney General, Robert F. Pyatt, Esquire; Defendants Agnes K. Head and KWEW, Inc. appearing through their attorney, L. George Schubert, Esquire, Hobbs, New Mexico; Defendant Permian Basin Radio Corporation appearing through its attorney, Theodore R. Johnson, Esquire, of Williams, Johnson & Houston, Hobbs, New Mexico; Defendant Abner Roberts not appearing; both sides announcing ready for trial, the following occurred, to-wit:

[fol. 44]

#### STIPULATION OF FACTS

By Mr. Pyatt: If the Court please, Mr. Johnson and I have a stipulation at this time.

By Mr. Johnson: It is hereby stipulated by and between the State of New Mexico, acting by and through its attorney, Robert F. Pyatt, and the Permian Basin Radio Corporation acting by and through its attorney, Theodore R. Johnson, that the Permian Basin Radio Corporation owns and operates Radio Station KHOB in Hobbs, New Mexico; that the Radio Station is a regional station; has coverage both in the State of New Mexico and the State of Texas, and that an area map prepared by Guy C. Hutchins, Consulting Radio Engineer of Arlington, Texas, for KHOB will be introduced in evidence, will (sic) admitted in evidence, and that KHOB has the coverage as shown by the map; and that further that at all times material hereto and that subsequent to the order enjoining the Defendant, Abner Roberts, that the Permian Basin Radio Corporation has accepted advertising from Abner Roberts, price advertising, and that it will continue to do so unless enjoined [fol. 45] by the Court. It is further stipulated that KHOB receives news coverage from Denver City, Seminole, Andrews, Seagraves, Brownfield, Kermit, Bledsoe and Plains, Texas; and that it handles advertising, spot advertising, from national advertising concerns; it is so stipulated that KHOB handles advertising for firms and merchants situated in the State of Texas.

By Mr. Pyatt: It is so stipulated, Your Honor, no objection to Mr. Johnson's stipulation.

By Mr. Schubert: Here is a written stipulation for the defendants I represent.

By Mr. Johnson: If there is anything in that stipulation that is not covered in mine, I would like for it to cover mine, also.

By Mr. Pyatt: No objection.



Whereupon, counsel presented argument to the Court and the following occurred:

#### MEMORANDUM OF COURT

By the Court: The Legislature of New Mexico passed an act prohibiting the advertisement in any form of prices of various paraphernalia sold by optometrists. That is a justifiable and reasonable exercise of the police power, for obvious reasons. Optometry is a science dealing with the public-health, and it is quite permissible that the State regulate it so as to attempt to insure that it be conducted in an ethical manner without competition (sic) attending on the sale of other goods. The Defendant Roberts is a non-resident of the State of New Mexico and beyond the jurisdiction of this Court, and his activities cannot be controlled by this Court. The three other defendants engage in disseminating news, advertising matter, by newspaper and radio. They are residents of this State and within its jurisdiction. Conceding (sic) that Roberts's (sic) acts are illegal and in violation of our law, I can see no persuasive reason why the defendants should not be restrained from aiding and abetting him in the illegal act. I do not think that either Little vs. Smith nor the Utah Case are in point. There, it was permissible to sell the items under certain licensing regulations. But, the State undertook to [fol. 47] prevent advertisement by the merchants of the fact that they had these items for sale, for legal sale. Here, it is illegal to price-advertise these items. There is no provision whereby it can be made legal. These defendants are engaged in a conspiracy to assist the Defendant Roberts in violating a law of the State of New Mexico. It so happens that in a neighboring state, there is no such act. But, the State of New Mexico is not prohibited from doing what it can to protect its citizens (sic) because the State of Texas does not see fit to take similar action. The injunction will issue to the other three defendants as prayed.

[fol. 48]

IN THE DISTRICT COURT OF LEA COUNTY  
STATE OF NEW MEXICO

[Title omitted]

## STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed between plaintiff, through its attorney, Robert F. Pyatt, and defendant Agnes K. Head, d/b/a Lea County Publishing Co. and defendant KWEW, Inc., through their attorney George L. [sic] Schubert of Hobbs, New Mexico, as follows:

The following instruments shall be admitted in evidence as defendants' exhibits, to-wit:

1. Coverage Chart prepared by The Branham Company, as Exhibit "A"
2. A five-page mimeographed [sic] Memorandum styled "How K-W-E-W RADIO SERVES THE PEOPLE with POWER plus PROGRAMS", as Exhibit "B"
3. Circulation List of the Hobbs Flare, as Exhibit "C"

It Is Further Stipulated and Agreed that if Harry McAdams, Manager of KWEW, Inc. was present [sic] in court as a witness that he would testify substantially [fol. 49] as follows:

KWEW, Inc. receives communications regarding its radio programs from Denver City, Texas, Andrews, Texas, Seminole, Texas, Seagraves, Texas, Lamesa, Texas and other towns and cities in West Texas, and if Mrs. Head, owner of the Lea County Publishing Co. was present in court as a witness that she would testify

That The Hobbs Flare has a Second Class Mailing Permit issued by the United States Postal Department.

It Is Further Stipulated and Agreed that both said defendants have accepted price ads from defendant Abner Roberts over the telephone and have done so since this

suit was instituted and unless restrained by the court will continue to do so in the future if such price ads are offered by Roberts.

**Robert F. Pyatt, Special Assistant Attorney General, P. O. Box 638, Hobbs, New Mexico, Attorney for Plaintiff.**

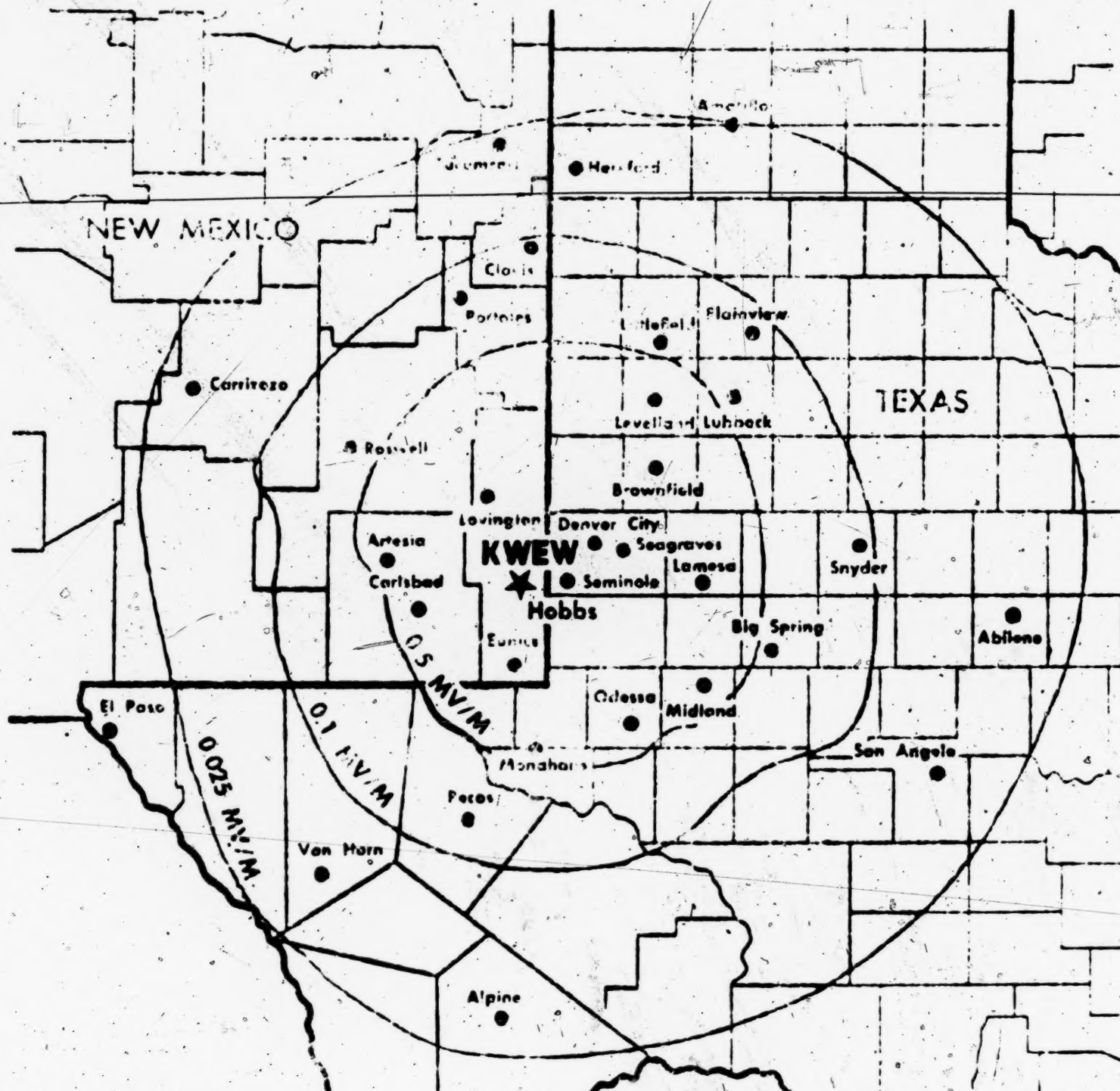
**L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for Defendants Agnes K. Head d/b/a Lea County Publishing Co. and KWEW, Inc.**

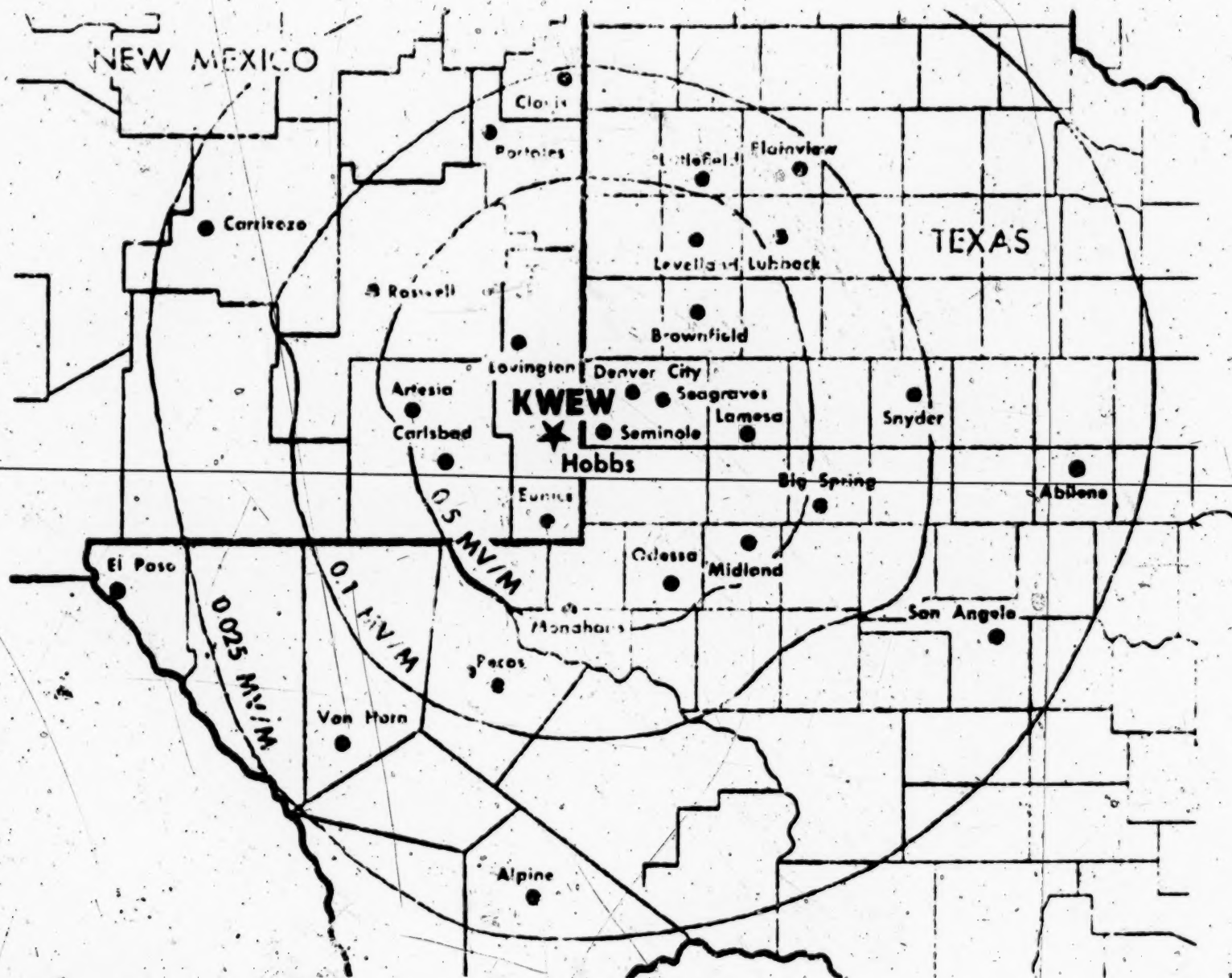
**KWEW**

1480 Kc

5,000 Watts

Hobbs, New Mexico





Regional coverage of one of the world's largest oil, potash, cattle and cotton producing kingdoms.

Radio Station KWEW  
Hobbs, New Mexico  
Telephone: EXpress 3-3137

Associated with Mutual Broadcasting System  
Through Local, Regional and National Stations  
News, Sport and National Events

Area Population	801,400
Radio Homes	200,700
Registered Automobiles	350,431
Annual Buying Power	\$782,730,000
(From Taxable Payrolls)	

**THE BRANHAM COMPANY, NATIONAL REPRESENTATIVE**

New York • Chicago • Detroit • St. Louis • Charlotte • Memphis • Atlanta • Dallas • L. A. • San Francisco

[fol. 51]

## EXHIBIT B

HOW K-W-E-W RADIO SERVES THE PEOPLE  
with  
POWER plus PROGRAMS

## [fol. 51A] K-W-E-W RADIO SPORTS

## I. FOOTBALL—Approximately fifty (50) games each season.

## a. High School

1. Hobbs High School complete schedule
2. Eunice, New Mexico, complete high school schedule

## b. College

1. Approximately ten games from Southwest and Border Conferences.
2. Approximately ten games from New Mexico University and Service Academies.

## c. Professional

1. Entire schedule of Baltimore Colts

## d. Bowl Games

1. Sun Bowl
2. North-South All-Stars
3. World Championship Professional (NBC)
4. Sugar Bowl (NBC)
5. Rose Bowl (NBC)

## II. BASKETBALL—Approximately seventy (70) games

## a. High School

1. Entire Hobbs High School basketball schedule including state play-off
2. Entire Eunice High School basketball schedule including state play-off
3. Hobbs Holiday Basketball festival



b. College

1. Approximately 18 games from Texas Tech of Lubbock, Texas

c. All-Star-High School

1. New Mexico High School all-stars for both basketball and football in August each year.

III. BASEBALL—Approximately 160 games each season.

- a. Major League baseball—"Game of the Day"—Monday through Sunday
- b. Major League All-stars games in July and August through the facilities of the National Broadcasting Company.
- c. The World Series through the facilities of the National Broadcasting Company.

IV. TRACK

- a. Hobbs Relays are presented each year.

V. BOXING

- a. Hobbs Regional Golden Gloves and New Mexico State Golden Gloves are broadcast each year.
- b. World Heavyweight Championship fights (ABC)

VI. RACING

- a. Indianapolis 500 mile Speedway Race is broadcast from start to finish each year.
- b. Nascar Races

[fol. 51B]

K-W-E-W RADIO NEWS

I. LOCAL NEWS

- a. K-W-E-W provides the *only* local radio news service which actually gathers and reports local news. K-W-E-W news usually is ahead of all other media by 5 hours or more.

- b. Local newscasts are presented at 6:30 a.m., 7:30 a.m., 11:30 a.m., 12:15 p.m., 1:00 p.m., 3:00 p.m., 6:00 p.m. and 9:00 p.m.
- c. Local news commentary and personal interviews are presented each day at 12:45 p.m. on "Around the Town".
- d. "From the Scene" direct news reports are provided with the use of mobile radio units. K-W-E-W Radio has broadcast direct reports on everything from tornadoes to murder within minutes of the time it happened.

## II. REGIONAL

- a. K-W-E-W Radio maintains telephone contact with the surrounding towns, Police Dept., Sheriff's Dept., State Police and Radar Weather Station.
- b. K-W-E-W Radio has 24 hour news service United Press International for Regional and Statewide coverage.

## III. NATIONAL AND INTERNATIONAL NEWS

- a. K-W-E-W Radio is affiliated with the Mutual Broadcasting System and utilizes the news reporting of such well-known reporters as Robert Hurleigh, Gabriel Heatter, Lyle Van, Frank Singiser, Cedric Foster and Richard Rendell.
- b. From Mutual K-W-E-W Radio presents news commentary and personal interviews on "The World Today" and "Capitol Assignment".
- c. From the national and local scene, K-W-E-W presents ball scores and other sports news on "Sports Lineup" each day and through the "Bill Stern Sports Newsreel" (MBS).

[fol. 51C]

## K-W-E-W RADIO PROGRAMMING

## I. MUSIC

- a. K-W-E-W recognizes that only about 8% of the listening audience is a teen age audience; consequently, does not program "Rock and Roll" music all day and throughout the evening. For the "Teen-age audience, K-W-E-W Radio offers "Maxes Waxes" each day from 4:00-5:00 p.m. and Coca Cola's "Hi-Fi Club" from 4:00-5:00 p.m. on Saturdays.
- b. Popular music by the better known orchestras is offered throughout each morning for the benefit of the housewife and modern music is programmed for the afternoon. Music for the evening consists of offerings by the better dance bands.
- c. Country and Western Music is programmed each day at 11:00-12:00 on "Country Bandstand" and at 7:05-7:30 p.m. on "Bunkhouse Jamboree". Pet Milk's "Grand Old Opry" is carried each Friday at 11:30 a.m.
- d. K-W-E-W also programs race music for the approximately 6,000 negro audience and Spanish music on the Margo Maldonado Show from 5:00-6:00 a.m. for the Spanish speaking audience of some 12,000 to 15,000 persons.
- e. K-W-E-W Radio presents more music of all types than any other service in the area.

## II. SPANISH LANGUAGE

- a. K-W-E-W Radio offers the *only* Spanish language service in Southeastern New Mexico and West Texas with its "Margo Maldonado Show" at 5:00-6:00 a.m. each day, "Mexico Lindo" at 10:30-11:00 a.m. on Sundays and "St. Helena's Ahora Catolico" on Sundays at 10:15-10:30 a.m.

### III. RELIGION

- a. K-W-E-W believes in the power of radio to promote religious teaching and makes its facilities available to all beliefs. Presently, K-W-E-W Radio broadcasts the "Lutheran Hour", "Old Fashioned Revival Hour", "Revivaltime", "Voice of Prophecy", "Radio Bible Class" and a wide variety of local programs including Negro religious broadcasts.

### IV. POLICY

- a. K-W-E-W Radio believes in expressing opinions and editorializes on national and local issues whenever necessary.
- b. K-W-E-W Radio believes that programming is the key to successful advertising; consequently, does *not* offer the same music at the same hours every day as an easy means of passing the time.
- [fol. 51D] c. While K-W-E-W Radio does not necessarily ridicule the use of surveys in markets the size of Hobbs, it does feel that surveys are used to sell advertising when *facts* about station service are absent and nonexistent. K-W-E-W Radio can point with pride to the many successful business firms in the area who have continuously used the K-W-E-W service for periods up to twenty years.
- d. K-W-E-W Radio contends that nighttime radio is necessary for the entertainment and service of the public and maintains the *only full time* radio service in Southeastern New Mexico and West Texas.

[fol. 52]

## EXHIBIT C

## THE HOBBS FLARE

CIRCULATION IN IMMEDIATE  
TRADE TERRITORY:

Monahans, Texas  
 Carlsbad, New Mexico  
 Electra, Texas  
 Luders, Texas  
 Clyde, Texas  
 Belen, New Mexico  
 Wylie, Texas  
 Amarillo, Texas  
 Seminole, Texas  
 Kermit, Texas  
 El Paso, Texas  
 San Antonio, Texas  
 Denver City, Texas  
 Abilene, Texas

Big Springs, Texas  
 McCamey, Texas  
 Childress, Texas  
 Houston, Texas  
 Richland Spgs., Texas  
 Bonham, Texas  
 Ft. Stockton, Texas  
 Austin, Texas  
 Odessa, Texas  
 Midland, Texas  
 Andrews, Texas  
 Plains, Texas  
 Lamesa, Texas  
 Seagraves, Texas  
 Higginbotham area on routes  
 in Texas.

## CIRCULATION BY STATES:


Arkansas  
 Kansas  
 Alaska  
 Oklahoma  
 Arizona  
 New York  
 Nevada

Colorado  
 California  
 Washington, D. C.  
 Missouri  
 Utah  
 Wyoming  
 Indiana

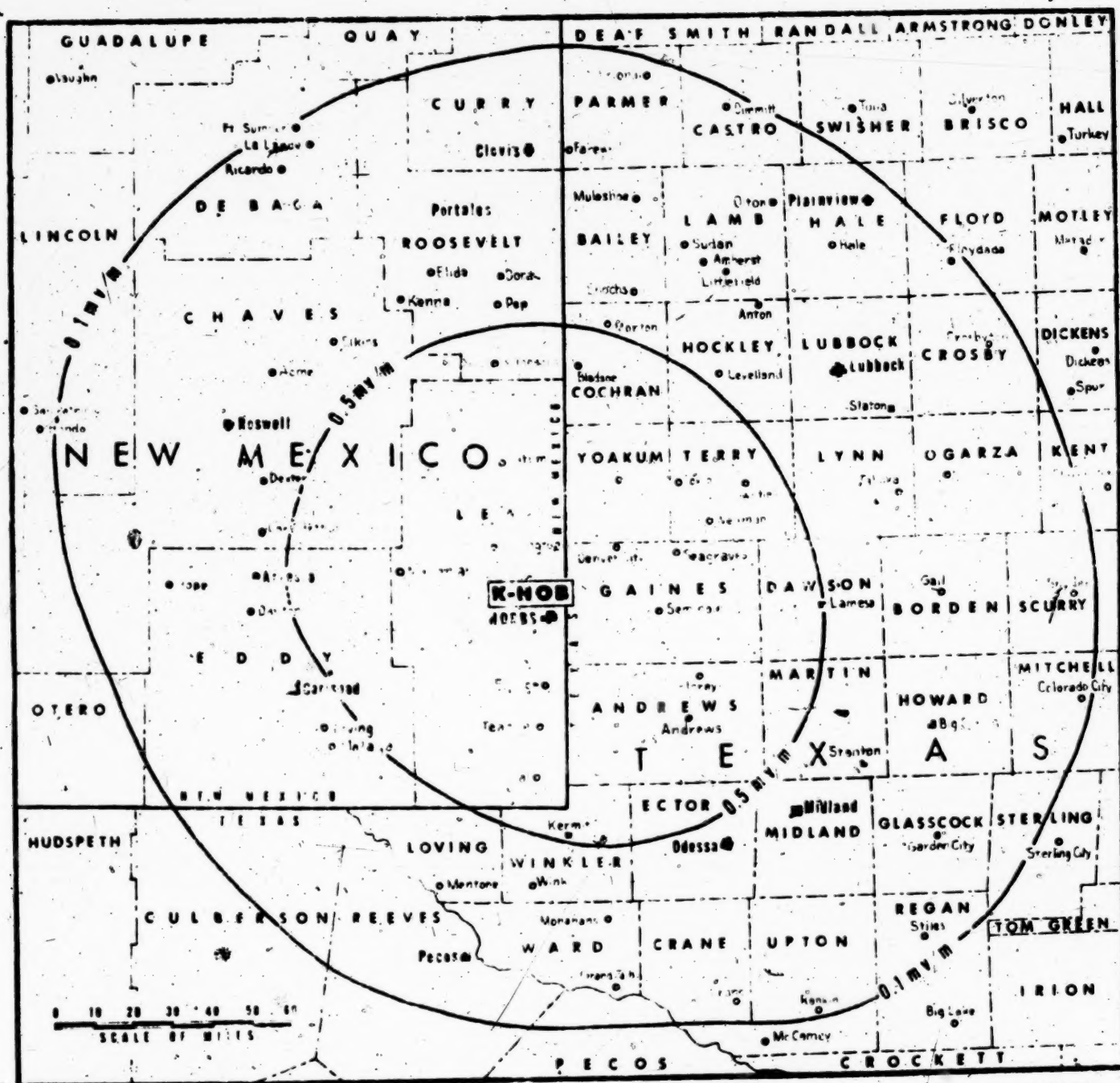
38

[fol. 53]

EXHIBIT No. 1

(See opposite) 



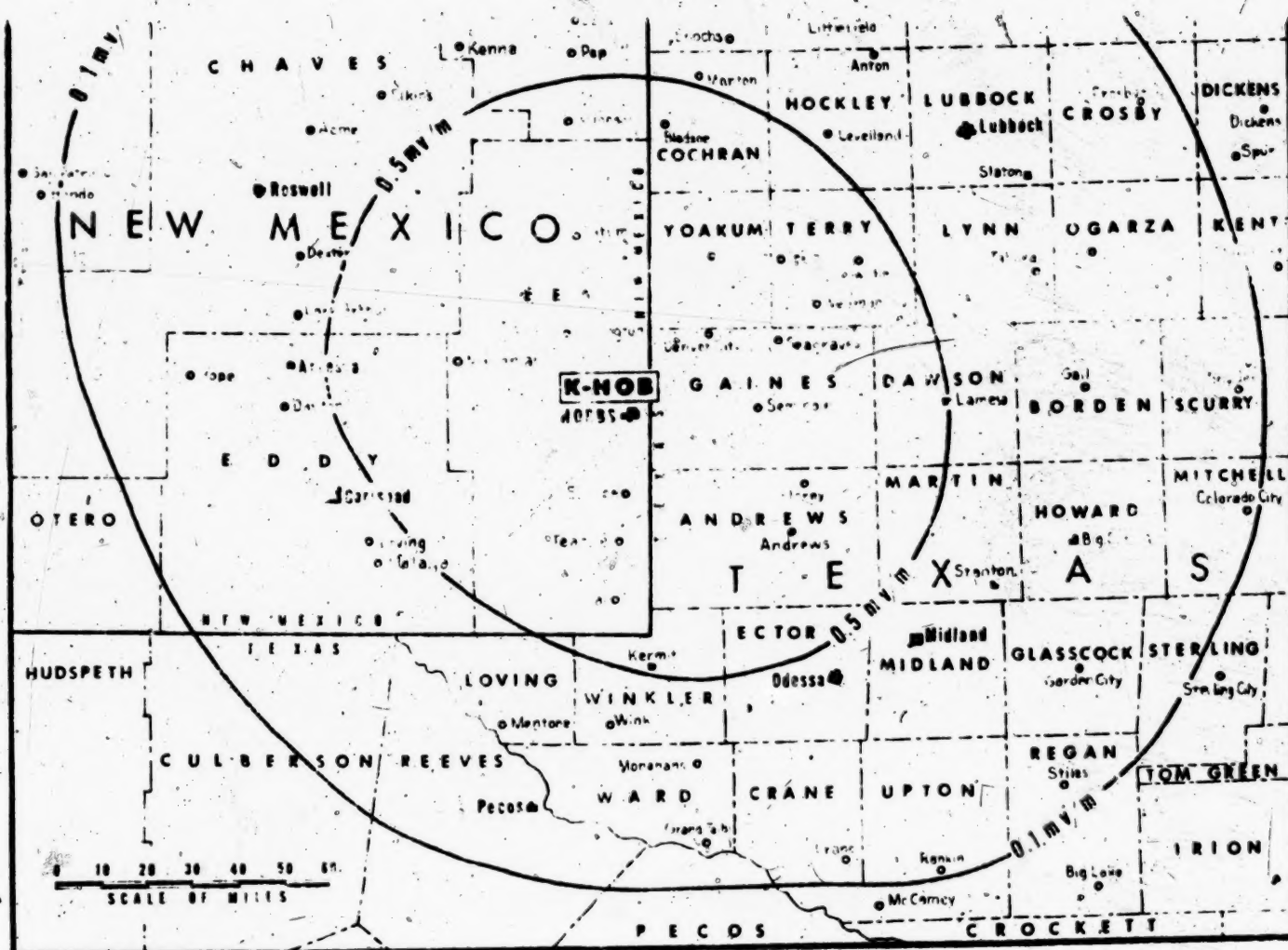


**K-HOB** Hobbs, New Mexico

Phone EA 3-5148 P. O. Box 247

7000 Hobbs

1000 Hobbs



CONDUCTIVITY VALUES ASSUMED  
SAME AS FCC 1915 MAP

JOHN C. HUTCHESON  
CONSULTING RADIO ENGINEER  
ABILENE, TEXAS

**K-HOB** *Hobbs, New Mexico*

*Phone ED 3-3148 P. O. Box 247*

*5000 Watts 63.90 Kilocycles*

Defendant, Permian  
Basin Radio Corp.  
Exhibit # 1.



[fol. 54] REPORTER'S CERTIFICATE (omitted in printing).

[fol. 55]

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—June 30, 1961

On this 30 day of June, 1961, at the hour of nine o'clock A. M., appeared before me, the undersigned District Judge, the Defendants, by their attorneys, L. George Schubert, Esquire, of Hobbs, New Mexico, and Theodore R. Johnson, Esquire, of Williams, Johnson & Houston, Hobbs, New Mexico, and submits to be settled, signed and sealed by me the Bill of Exceptions in the above entitled cause; and it appearing from the record that Robert F. Pyatt, Esquire, Attorney for the Plaintiff, has waived the statutory five days notice of intention to apply for this Order, and no objections being made:

Now, Therefore, I, John R. Brand, Judge of the Fifth Judicial District of the State of New Mexico, do hereby [fol. 56] certify that I am the Judge who presided at the trial and entered the decision in this cause; that Ray Crowder was the official court reporter who reported said cause; that the annexed and foregoing transcript of proceedings and evidence, duly certified by said official court reporter, is the transcript of proceedings and evidence in said cause and contained with the records and exhibits therein referred to and identified and the matters therein contained, all of the testimony offered, given or introduced in said cause, all objections of the parties thereto, all rulings of the Court thereon, and all motions made by the parties, the rulings of the Court thereon, and the exceptions of the parties thereto during said trial.

And, inasmuch as the matters and things stated in the foregoing transcript are not of record in this cause, and

to the end that the same may become a part of the record on appeal to the Supreme Court in said cause,

It Is, Therefore, Ordered that the said official court reporter's transcript, consisting of pages 43 to 54, inclusive, as aforesaid, be filed as Defendants' Bill of Exceptions in said cause; and that said transcript be, and I hereby certify that the same is at this time signed, sealed, settled and delivered by the undersigned, presiding Judge of said Court, as the Bill of Exceptions on appeal in this cause.

John R. Brand, District Judge.

[fol. 57] COST CERTIFICATE (omitted in printing).

[fol. 58] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 59]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 7001

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,  
Plaintiff-Appellee,

vs.

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY  
PUBLISHING CO.; PERMIAN BASIN RADIO CORPORATION;  
and KWEW, Inc., Defendants-Appellants.

MOTION FOR AND ORDER EXTENDING TIME TO FILE BRIEF

Comes Now the defendants-Appellants, Agnes K. Head, d/b/a Lea County Publishing Co., and KWEW, Inc., by and through their attorney, L. George Schubert, and Permian Basin Radio Corporation, by and through its attorneys, Williams, Johnson & Houston, of Hobbs, New Mexico,

and move the court for an extension of time to August 31, 1961, in which to file the brief in chief in this cause.

L. George Schubert, Hobbs, New Mexico, Williams, Johnson & Houston, By Theodore R. Johnson, P.O. Box 1926, Hobbs, New Mexico, Attorneys for Defendants-Appellants.

Granted This 7th day of Aug. 1961, J.C.C., Chief Justice.

[fol. 60]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

[Title omitted]

NOTICE OF EXTENSION OF TIME—Filed August 14, 1961

To: Robert F. Pyatt, P.O. Box 638, Hobbs, New Mexico, Attorney for New Mexico Board of Examiners in Optometry.

Notice Is Hereby Given that the Supreme Court of the State of New Mexico granted the defendants-Appellants until August 31, 1961, to file their brief in chief.

L. George Schubert, P. O. Box 185, Hobbs, New Mexico, Attorney for defendants Agnes Head, d/b/a Lea County Publishing Co., and KWEW, Inc. and Williams, Johnson & Houston, By Theodore R. Johnson P.O. Box 1926, Hobbs, New Mexico, Attorney for Permian Basin Radio Corporation.

Certificate of service (omitted in printing).



[fol. 61]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

[Title omitted]

REQUEST FOR ORAL ARGUMENT—Filed August 31, 1961

The undersigned counsel for Defendants-Appellants in the above entitled cause hereby requests that the same be set down for oral argument.

Theodore R. Johnson, Counsel for Defendants-Appellants.

[fol. 126]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 7001

Supreme Court of New Mexico

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,  
Plaintiff-Appellee,

vs.

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY  
PUBLISHING CO.; PERMIAN BASIN RADIO CORPORATION;  
and KWEW, Inc., Defendants-Appellants.

OPINION—Filed April 11, 1962

Appeal from the District Court of Lea County.

Brand, Judge.

Earl E. Hartley, Attorney General, Santa Fe, New  
Mexico.

Robert F. Pyatt, Special Assistant Attorney General,  
Hobbs, New Mexico.

Attorneys for Appellee.



L. George Schubert, Hobbs, New Mexico, Attorney  
for Appellants Agnes K. Head & KWEW, Inc.

Williams, Johnson & Houston, Hobbs, New Mexico,  
Attorneys for Appellant, Permian Basin Radio  
Corp.

[fol. 127]

Compton, Chief Justice.

This is an appeal from a final decree, perpetually enjoining and restraining defendants Agnes K. Head, d/b/a Lea County Publishing Company, publisher of the newspaper Hobbs Flare; Permian Basin Radio Corporation, owner and operator of radio Station KHOB; and KWEW, Inc., owner and operator of radio station KWEW, all of Hobbs, New Mexico, from accepting, disseminating and publishing within the State of New Mexico advertising of any nature from defendant, Abner Roberts, a resident of Texas, which quotes prices or terms on eye glasses, spectacles, lenses, frames, or mountings, or quotes discounts to be offered on same, or which quotes moderate prices, or words of similar import, as prohibited by the provisions of Sec. 67-7-13, N.M.S.A. 1953.

The trial court found that the defendants, other than Roberts, in publishing the advertising, were aiding and abetting in and encouraging the violation of this section of the statute and that enjoining them from so doing does not offend either the Constitution of the United States or the Constitution of New Mexico.

The pertinent portions of the statute read as follows:

"67-7-13. OFFENSES-PENALTIES.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than \$50.00 nor more than \$200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than \$200.00 nor more than \$500.00, or imprisonment in the county jail for not less than 90 days nor more than one (1) year, or both

such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

“(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings or which quotes discount [fol. 128] to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes ‘moderate prices,’ ‘low prices,’ ‘lowest prices,’ ‘guaranteed glasses,’ ‘satisfaction guaranteed,’ or words of similar import.”

Abner Roberts, a defendant below but not a party to this appeal, resides and practices optometry in Gaines County, Texas, located approximately 4 miles east of Hobbs, New Mexico, and in the trade area served by the news media of the other defendants who are the appellants here and who have their principal places of business in Hobbs, New Mexico. Roberts placed his advertisements with them by telephone.

It is conceded by appellants on this appeal that if Roberts were a resident of, or practicing optometry in, New Mexico the above statute would be applicable to and enforceable against him. But it is appellants' contention that because they are engaged in interstate commerce the statute upon which this action is based constitutes an obstruction on such commerce by restraining them from engaging in interstate commerce with a citizen of Texas lawfully practicing optometry in Texas and that, therefore, (1) the statute in question violates the provisions of Article I, Section 8, Paragraph 3 of the Constitution of the United States relating to interstate commerce; and (2) that it is an unreasonable infringement of personal property rights, an unwarranted oppressive interference with the liberty of contract and violates the Fourteenth Amendment of the Constitution of the United States and Article II, Section 18 of the Constitution of New Mexico.

It is the contention of the appellee, on the other hand, that the regulation of interstate commerce is not involved in this action since the New Mexico statute as well as the

decree of the court below seek only to control conduct in New Mexico in the legitimate exercise of its police power.

In support of appellants' first contention that this statute [fol. 129] violates the commerce clause in its application to them, appellants have cited cases which define interstate commerce and conclude that newspapers with circulation in other states, and radio stations whose programs are received in other states, are engaged in interstate commerce. We have no quarrel with the decisions in these cases insofar as they deal with the prohibition by a state of *all* advertising relating to a commodity moving in interstate commerce *into* its state from another state for legal sale in its original package, or with direct burdens on, or direct interference with, the publication and circulation of newspapers in interstate commerce or the privilege of doing business in interstate commerce, or with state statutes which conflict with federal legislation where Congress has fully occupied the field. But appellants have brought to our attention no authority for the proposition that persons engaged in interstate commerce are under no circumstances subject to valid legislation of the state in which they are doing business enacted in the exercise of its police power for the health and welfare of its citizens.

The Legislature of New Mexico enacted Section 67-7-13, *supra*, to protect its citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes. That this is a valid exercise of the police power of the state is not questioned in this action and, in view of the decisions cited by appellee upholding the constitutionality of similar statutes in other states, we do not think it can be. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461; *Ritholz v. Indiana State Board of Registration and Examination in Optometry (USDC N.D. Ind.)*, 45 F. Supp. 423; *Abelson's Inc. v. New Jersey State Board of Optometrists*, 5 N.J. 412, 75 A. 2d 867; *City of Springfield v. Hurst*, 144 Ohio St. 49; 56 N.E. 2d [fol. 130] 185; *Commonwealth v. Ferris*, 305 Mass. 233, 25 N.E. 2d 378; *Ritholz v. Commonwealth*, 184 Va. 339, 35 S.E. 2d 210; *Seifert v. Buhl Optical Company*, 276 Mich.

692, 268 N.W. 784; *State v. Rones*, 223 Ia. 839, 67 So. 2d 99 and *Bedno v. Fast*, 6 Wis. 2d 471, 95 N.W. 2d 396.

Article I, Section 8 of the Constitution of the United States delegates to Congress the authority to regulate interstate commerce. And it is settled that newspapers and radio stations are instrumentalities of interstate commerce within the meaning of that provision. It is nevertheless established that the states are not wholly precluded from exercising their police power in matters of local concern even though they may thereby indirectly affect interstate commerce. *Kroeger v. Stahl*, (CCA, 3rd Cir.), 248 F. 2d 121; *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813; *Simpson v. Shepard*, 230 U.S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, and *Florida Lime and Avocado Growers, Inc. v. Paul*, (DC, N.D. Cal.) 197 F. Supp. 780. This police power extends to the right of the state to regulate trade and callings concerning public health. *Polhemus v. American Medical Association*, (CCA 10th Cir.), 145 F. 2d 357.

It is clear that state action affecting interstate commerce is precluded in three types of situations: (1) where state action directly burdens interstate commerce; (2) where state action conflicts with federal regulations; and (3) where Congress has evidenced an intent to completely preempt the area of regulation involved. *Western Live Stock v. Bureau of Revenue*, 41 N.M. 141, 65 P 2d 863; *Kelly v. State of Washington*, 302 U.S. 1, 58 S.Ct. 87, 82 L. Ed. 3; *Central Illinois Pub. Serv. Co. v. Illinois Commerce Commission*, 18 Ill. 2d 506, 165 N.E. 2d 322; and *Pennsylvania R. Co. v. Department of Public Utility Com'rs.*, 14 N.J. 411, 102 A.2d 618.

[fol. 131] The issues presented in this case, therefore, are: (1) Has the prohibition in Section 67-7-13(m), supra, against price-advertising in New Mexico in the field of optometry, as a valid exercise of the police power of the state, been superseded by federal legislation relating to advertising in interstate commerce with which it is in conflict, and (2) if Congress has not pre-empted the field of interstate advertising in the optometric field, does the enjoining of appellants from accepting and disseminating

price-advertising in New Mexico from a non-resident obstruct or directly interfere with interstate commerce?

With respect to (1) above, the Federal Trade Commission Act, Title 15, Section 52, U.S.C.A., prohibits the dissemination, or causing to be disseminated, of any *false* advertising in interstate commerce, either directly or indirectly to induce, or which is likely to induce, the purchase of foods, drugs, devices or cosmetics. In holding that this is not a pre-emption by Congress of the entire field of advertising in interstate commerce so as to preclude this state from exercising its police power for a matter of local health protection, we adopt the holding in *Bedno v. Fast*, supra, wherein the court in dealing with this same question, at least insofar as newspaper advertising is concerned, said:

"... A reading of the statute (15 U.S.C.A. Sec. 52) will show that it prohibits only *false* advertising as an unfair or deceptive act in commerce. Congress has not seen fit to include within the scope of federal legislation the dissemination of truthful advertising. Thus, the federal act does not cover the subject matter of Sec. 153.10 Stats. (Wisconsin statute similar to that of New Mexico) and does not by pre-emption preclude the state from so exercising its police power. ..."

With respect to radio broadcasting, Congress has occupied [fol. 132] the field by virtue of the Federal Communications Act of 1934. *Regents of New Mexico v. Albuquerque Broadcasting Company*, (CAA 10th Cir.), 158 F. 2d 900. The express underlying purpose of this Act is to protect the public interest in interstate communication. Section 303 of Title 47, U.S.C.A. gives the Commission authority to suspend the license of any operator who transmits communications containing profane or obscene words, language, or meaning, or false or deceptive signals or communications. Section 1464, Title 18, U.S.C.A. provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication. These are the federal provisions with which the Pennsylvania statute was in conflict in the



case of *Allen B. Dumont Laboratories v. Carroll*, (CCA Pa.), 184 F. 2d 153 cited by appellants. We find no such conflict in the case before us. The Federal Communications Act does not attempt to regulate truthful advertising by radio in interstate commerce.

In *Kelly v. State of Washington*, 302 U.S. 1, 58 S. Ct. 87, 82 L. Ed. 3, the court stated:

"... The principal is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only wherein the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

The intention to supersede the exercise by the state of its police powers as to matters not covered by federal legislation is not to be implied unless the Act of Congress, fairly interpreted, is in conflict with the law of the state. In other words, the intention of Congress to regulate exclusively under the commerce clause will not be implied unless the federal measure is plainly inconsistent with state regulation of the same subject. *Savage v. Jones*, 225 U.S. [fol. 133] 501, 56 L. Ed. 1182; *Atlantic Coast Line Railroad Company v. Georgia*, 234 U.S. 280, 58 L. Ed. 1312; *Carey v. South Dakota*, 250 U.S. 118, 63 L. Ed. 886; *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of California*, 283 U.S. 380, 75 L. Ed. 1128; *Mintz v. Baldwin*, 289 U.S. 346, 77 L. Ed. 1245.

Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. *Southern Pacific Company v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915; *Aladdin Industries, Inc. v. Associated Transport, Inc.*, 42 Tenn. App. 52, 298 S.W. 2d 770.



Finding no pre-emption by Congress of the entire field of advertising in interstate commerce, and no conflict between federal legislation relating to false advertising, or to false or deceptive communications and our statute seeking to regulate truthful advertising as a health and welfare measure, we must determine whether Section 67-7-13 constitutes an obstruction on or direct interference with interstate commerce in violation of the federal constitution as contended by appellants.

As we construe Section 67-7-13, it contains no restrictions directed toward the regulation of interstate commerce. It does not prohibit the publication and circulation of appellants' newspaper in interstate commerce. It does not prohibit or exclude the news media in this state from accepting advertising from citizens of other states for publication here and circulation in interstate commerce. It does not prohibit the advertising of optometric goods either [fol. 134] in this state or in interstate commerce. It merely places a restriction, in the exercise of its police power, on the manner in which advertising in the field of optometry can be done within this state alone by "any person" and "by any means." Enjoining appellants from accepting and disseminating price-advertising by their news media in New Mexico for the benefit of a local business in Gaines County, Texas, does not affect the free flow of interstate commerce with respect to proper subjects of that commerce, or contracts for the dissemination of national or foreign news and information regarding proper subjects of commerce, as defined in the cases cited by appellants. We are in agreement with the line of reasoning expressed in *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894, a state in which the sale or keeping for sale of intoxicating liquor was illegal, which involved a valid exercise of the police power prohibiting the advertising within the state of liquor sold or kept for sale without the state. The court said:

"... If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mis-

chief as would result from such advertisements being printed in newspapers published within ~~its own~~ the state ~~territory~~. It may to that extent control the conduct of printers and publishers within its own territory. . . ."

Having determined that Section 67-7-13(m) does not constitute an obstruction on interstate commerce, we come to appellants' second contention that the statute is an unreasonable infringement of personal property rights and an unwarranted oppressive interference with their liberty of contract in violation of the Constitutions of the United States and of New Mexico. In support thereof, appellants [fol. 135] rely on the case of *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 in which a statute prohibited the advertising of items legally for sale within the state. It seems clear to this court that the case is not in point since we are not dealing here with the prohibition of advertising but a reasonable police regulation of the manner in which the advertising can be done in this state. Appellants quote from *Little v. Smith*, as follows:

" . . . A statute restraining the liberties and property rights of citizens cannot be upheld unless it has real relation to its object and the regulation reasonably adapted to accomplish the end sought to be attained. . . ."

The court in that case found the absolute prohibition to be discriminatory, but we think there can be no question but that the valid exercise of the police power in this case has a real relation to the objects sought to be attained. As has been held by this Court in *Green v. Town of Gallup*, 46 N.M. 71, 120 P. 2d 619, and *Mitchell v. City of Roswell*, 45 N.M. 92, 111 P. 2d 41, property and property rights are held subject to the fair exercise of the police power and a reasonable regulation, enacted for the benefit of public health, convenience, safety or general welfare is not unconstitutional "taking of property" in violation of the contract clause, "due process" clause or "equal protection" clause of the Federal Constitution. Nor would it violate

any constitutional rights guaranteed by the Constitution of New Mexico. See *Klein v. Department of Registration and Education*, 412 Ill. 75, 105 N.E. 2d 758.

We conclude as did the trial court, enjoining the appellants from aiding and abetting a non-resident in the violation [fol. 136] of a law of New Mexico is as essential to the administration of the provisions of our statutes relating to the practice of optometry for the health and welfare of our citizens as would be the prosecution of a resident optometrist for the same offense.

The judgment should be affirmed. It Is So Ordered.

J. C. Compton, Chief Justice.

We Concur: David W. Carmody, David Chavez, Jr., M. E. Noble, JJ.

Moise, J., not participating.

[fol. 137]

IN THE SUPREME COURT OF NEW MEXICO

LEA COUNTY

Wednesday, April 11, 1962

No. 7001

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,  
Plaintiff-Appellee,

vs.

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY  
PUBLISHING Co.; PERMIAN BASIN RADIO CORPORATION;  
and KWEW, Inc., Defendants-Appellants.

JUDGMENT—April 11, 1962

This cause having heretofore been argued, submitted and taken under advisement, and the Court being now suffi-

ciently advised in the premises announces its decision by Chief Justice Compton, Mr. Justice Carmody, Mr. Justice Chavez and Mr. Justice Noble concurring, Mr. Justice Moise not participating, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file;

Now, Therefore, It Is Considered, Ordered and Adjudged by the Court that the judgment of the District Court within and for the County of Lea, whence this cause came into this Court, be and the same is hereby affirmed, and the cause is remanded to the said District Court of Lea County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

[fol. 138]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE—May 3, 1962

The State of New Mexico To The District Court, sitting within and for the County of Lea, Greeting:

Whereas, in a certain cause lately pending before you, numbered 18794 on your Civil Docket, wherein New Mexico Board of Examiners in Optometry was Plaintiff, and Abner Roberts, Agnes K. Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation and KWEW, Inc., were Defendants, by your consideration in that behalf judgment was entered against said Defendants; and

Whereas, said cause and judgment were afterwards brought into our Supreme Court for review by Defendants by appeal, whereupon such proceedings were had that on April 11, 1962, an opinion was handed down and the judgment of said Supreme Court was entered affirming your judgment aforesaid, and remanding said cause to you;

Now, Therefore, this cause is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and the judgment of this Court.

law, or as a denial to them of equal protection of the laws.

Carol J. Head, 11 Broadway, New York 4, New York,  
Attorney for Agnes K. Head, d b a Lea County  
Publishing Co., and Permian Basin Radio Cor-  
poration.

[fol. 143] Affidavit of Service (omitted in printing).

[fol. 144] Clerk's Certificate to foregoing transcript  
(omitted in printing).

[fol. 145]

# SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—November 13, 1962

Appeal from the Supreme Court of the State of New  
Mexico.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. In addition to the questions listed in the jurisdictional statement, the parties are requested to address themselves to the issue of possible federal preemption by reason of the Federal Communications Act. The Solicitor General is also invited to express the views of the Federal Communications Commission on this issue.

November 13, 1962

Witness, The Honorable J. C. Compton, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 3rd day of May, 1962.

Lowell C. Green, Clerk of the Supreme Court of the State of New Mexico.

[fol. 139]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

[Title omitted]

RECEIPT FOR MANDATE—May 4, 1962

Received of Lowell C. Green, Clerk of the Supreme Court, mandate of said Court directed to the District Court of Lea County, issued on 3rd day May, 1962, in the above entitled cause.

W. M. Beauchamp, Clerk of District Court, Lea County.

Dated at Lovington, New Mexico, May 4, 1962.

[fol. 140]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 7001

AGNES K. HEAD, d/b/a/LEA COUNTY PUBLISHING CO., and  
PERMIAN BASIN RADIO CORPORATION, Appellants,

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed July 6, 1962

I. Notice is hereby given that Agnes K. Head, d/b/a Lea County Publishing Co., and Permian Basin Radio Corpora-



tion, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico affirming the judgment of the District Court of Lea County, State of New Mexico, by which appellants were enjoined from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eye glasses, spectacles, lenses, frames or mountings, or which quotes discounts to be offered on same, or which quotes moderate prices, or words of similar import, as prohibited by the provisions of Section 67-7-13, New Mexico Statutes Annotated; 1953, entered in this action on April 11, 1962.

This appeal is taken pursuant to 28 U.S.C.A. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol.141] a. In the District Court of Lea County, State of New Mexico:

- (1) All pleadings;
- (2) All requested findings of fact and conclusions of law;
- (3) All stipulations, exhibits and oral evidence introduced in the trial in the District Court;
- (4) Reporter's transcript of all proceedings not filed of record;
- (5) All orders, judgments, decrees and decisions of the District Court;
- (6) Motion and order granting appeal to the Supreme Court of the State of New Mexico; and
- (7) Notice of Appeal to the Supreme Court of the State of New Mexico.

b. In the Supreme Court of the State of New Mexico:

- (1) Appellants' Brief in Chief;

- (2) Appellee's Answer Brief;
- (3) Appellants' Reply Brief;
- (4) Opinion of the Supreme Court of the State of New Mexico; and
- (5) Reporter's transcript of all proceedings not filed of record.

c. Any other papers, instruments, pleadings, orders, opinions and matters of record in this action in the District Court of Lea County, State of New Mexico, or in the Supreme Court of the State of New Mexico.

III. The following questions are presented by this appeal:

Whether Section 67-7-13 of New Mexico Statutes Annotated, 1953, as applied to appellants, residents of New Mexico [fol. 142] who in New Mexico are engaged in interstate commerce through the publishing of a newspaper and the operation of a television station, respectively, having circulation and broadcast coverage in both New Mexico and States other than New Mexico, in prohibiting, and the action of the New Mexico courts thereunder in enjoining, appellants from publishing and disseminating in the State of New Mexico certain commercial advertising of eye glasses, lenses and frames and services relating thereto by a resident of the State of Texas practising optometry and offering such advertised articles and services for sale only in the State of Texas, is:

- (1) unconstitutional as an undue and unreasonable burden on interstate commerce under the "Commerce Clause" of the United States Constitution, Article I, Section 8, clause 3.
- (2) unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, either as an abridgment of their privileges [sic] and immunities as citizens of the United States, or as a deprivation of their property without due process of